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No. 398

In the Supreme Court of the United States

OCTOBER TERM, 1957

WILL PARKS CLAY AND MATTIE BELL ANDERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Rule involved	2
Statement	3
Argument	6
Conclusion	8

CITATIONS

Cases:	
Brinegar v. *United States*, 338 U. S. 160	7
Hawkins v. *United States*, 238 F. 2d 265, certiorari denied, 353 U. S. 925	7
Hefferman v. *United States*, 50 F. 2d 554	8
Lowrey v. *United States*, 161 F. 2d 30, certiorari denied, 331 U. S. 849	7
Nuckols v. *United States*, 99 F. 2d 353, certiorari denied, 305 U. S. 626	8
Sgro v. *United States*, 287 U. S. 206	8
United States v. *Callahan*, 17 F. 2d 937	8
United States v. *Fitzmaurice*, 45 F. 2d 133	8
Statute, Rule, and Regulations:	
26 U. S. C. (1952 ed.) 32–90	7
Federal Rules of Criminal Procedure, Rule 41 (c)	2
17 F. R. 6732	8

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1957 (Pet. 17). A petition for rehearing was denied August 5, 1957 (Pet. 2). The petition for a writ of certiorari was filed on August 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Three affidavits by Internal Revenue agents signed and sworn to before a United States Commis-

sioner were attached to a form of affidavit for a search warrant which was not signed by the officers but which bore the seal and jurat of the Commissioner. The question is whether a search warrant was properly issued on the basis of these documents.

2. Whether there was probable cause for the issuance of the search warrant.

RULE INVOLVED

Rule 41 (c) of the Federal Rules of Criminal Procedure provides:

> (c) ISSUANCE AND CONTENTS. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the dis-

trict judge or the commissioner to whom it shall be returned.

STATEMENT

A three count indictment returned in the United States District Court for the Middle District of Georgia charged petitioners and others with conspiracy to evade and defeat the payment of taxes in connection with the "numbers" business, and charged petitioner Clay with the substantive offenses of attempting to evade such taxes (R. 2–7). Upon conviction after trial by jury, petitioner Clay was sentenced to four years' imprisonment and a fine of $4,000 on each count, the terms of imprisonment to run concurrently (R. 8–9). Petitioner Anderson was sentenced to eighteen months on count 1 (R. 10). The Court of Appeals affirmed.

Petitioner Clay was apprehended by agents of the Internal Revenue Service as he ran with a paper bag toward a house in Athens, Georgia, where he and petitioner Anderson resided and for which the agents had procured a search warrant. In the ensuing struggle, petitioner dropped the paper bag which contained lottery tickets and was arrested. A search of the premises yielded incriminating evidence of lottery operations.

The sole issue here is the validity of the search warrant which was sustained against petitioners' motion to suppress.

The warrant was issued by the Commissioner at Macon, Georgia, on June 21, 1955 (R. 11–12), and was supported by five documents. The first was a form headed "Affidavit for Search Warrant", which

described the premises to be searched, the property believed to be concealed therein and the general nature of the violation (R. 14–15), much in the same format as that employed in the search warrant. In the space following the words of the form "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:" there were typed the words "See attached affidavits". The form was not signed by any officer, but the Commissioner's signature appears in the space provided therefor (R. 15).

Three annexed affidavits were sworn to before the Commissioner whose signature appears at the end of each (R. 16–20). The affidavit of agent W. A. Pair was to the effect that an informer of known reliability had reported, on June 6, that Clay was "checking up" his lottery operations in Anderson's house; that by trailing Clay's automobile at excessive speeds, and through contact with an informer, the agent was able to locate the house (the premises to be searched); that on five separate occasions, between June 6 and the date of the affidavit, Clay had changed automobiles at a service station, alighting from a 1951 Buick and entering a 1955 black Oldsmobile without license plates which the affiant had seen parked in the driveway of Mrs. Anderson (R. 18, 19). The agent swore that on two previous occasions he had arrested Clay and had both times found lottery equipment on his person (R. 19).

The affidavit of agent R. E. Lewis recited that Clay, upon several occasions prior to June 21st, had driven a 1955 black Oldsmobile without license plates into the

driveway of the premises designated in the search warrant, and had alighted and carried into the house paper bags of the type and size commonly used by lottery operators; that Clay had a reputation for engaging in the business of accepting wagers for profit, and that he was known in the neighborhood under an alias (R. 16, 17).

In his affidavit, agent W. A. Morris swore that on June 6, 1955, he searched the records of the District Internal Revenue Service in Atlanta and found that neither Clay nor any person named Anderson had obtained a special occupational tax stamp for the fiscal year ending June 30, 1955, required of lottery operators; that, on June 20, 1955, a check of telephone company records showed that in the six preceding months, a number of long distance telephone calls had been made from the house designated in the warrant to known or reputed lottery operators (R. 18).

A fourth affidavit of an agent duBignon was sworn to, not before the Commissioner, but before an agent of the Internal Revenue Service in Atlanta. Dated June 20, 1955, it recited that a check of the Revenue records in Atlanta failed to show that any occupational tax stamp had been purchased by Clay, in his name or under any likely alias, or by any of his known employees (R. 15, 16).

The search warrant itself was on a form and reads in part "Affidavit having been made before me by William A. Pair, William A. Morris and Richard E. Lewis, and an affidavit having been made by F. G. duBignon, that he (has reason to believe) that (on the premises known as) 140 Morton Avenue, Athens,

Georgia, Athens Division in the Middle District of Georgia, (here describe property) there is now being concealed certain property * * *."

ARGUMENT

1. Petitioners' attack on the search warrant centers in part on the fact that the form affidavit was not signed, but instead, in the space provided for setting out the facts, there appeared the words "See Attached Affidavits". The affidavit of each of three officers was subscribed and sworn to by the Commissioner (R. 17, 18, 20). Essentially therefore, petitioners' argument amounts to this: if all three affidavits could have been compressed into the space allowed on the printed form, the warrant would have been in order, but since more space was needed, the documents could not be read together. The lack of merit in the argument is self-evident.

Petitioners also endeavor to attach significance to the fact that the search warrant, after referring to the affidavit of the three officers as made before the commissioner and to the further affidavit of duBignon, then goes on to speak in the singular, *i. e.*, "that he (has reason to believe)." Petitioners argue that this shows that the affidavit of duBignon, who did not appear before the commissioner, was the affidavit principally relied upon. It is evident, however, that the form is printed in the singular and that language changes to the plural were not made in the form. This is hardly sufficient to invalidate a warrant which clearly refers to the affidavits of three persons sworn to before the Commissioner.

2. The court below properly held that, disregarding the duBignon affidavit as not sworn to before the Commissioner, there was adequate showing of probable cause for issuance of the search warrant on the basis of the affidavits of the other three agents. The facts there set forth were sufficient to "warrant a man of reasonable caution in the belief that an offense has been or is being committed"—the test of probable cause laid down by this Court in *Brinegar* v. *United States,* 338 U. S. 160, 175, 176.[1] The only requirement as to the sufficiency of supporting affidavits is that they set forth such facts as are necessary to satisfy the Commissioner that there is probable cause to believe that the grounds for the application exist. *Lowrey* v. *United States,* 161 F. 2d 30 (C. A. 8), certiorari denied, 331 U. S. 849; *Hawkins* v. *United States,* 238 F. 2d 265 (C. A. D. C.), certiorari denied, 353 U. S. 925. Manifestly it is not necessary that the affiant actually see the illegal activity in operation.

There is no merit to petitioners' argument that because the affidavit of Morris, while executed on the date of the warrant, showed that they had not purchased an occupational tax stamp as of June 6, 1955, it did not establish that they were violating a statute at the time the warrant was issued some fifteen days thereafter (Pet. 12–13). The statute here involved requires the special tax to be paid before engaging in the wagering business (see 26 U. S. C. 3290 (1952

[1] While the *Brinegar* case dealt with probable cause to search without a warrant, the Court's discussion of other decisions relating to search warrants (338 U. S. at pp. 174–176, particularly fns. 13 and 15) confirms that the definition there laid down was intended to apply generally to all searches.

ed.); 17 F. R. 6732). There was legally sufficient information before the Commissioner to show that petitioners were engaged in the business on and prior to June 6 and continually up until the time the warrant was issued on June 21, 1955. Particularly in the light of these circumstances, the facts in the Morris affidavit were so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. See *Sgro* v. *United States*, 287 U. S. 206, 210. In the following cases, lapses of time of between 11 and 21 days, from the date information was secured until the affidavit was made, or the warrant issued, did not invalidate the search warrant or the search. *Nuckols* v. *United States*, 99 F. 2d 353 (C. A. D. C.), certiorari denied, 305 U. S. 626; *United States* v. *Callahan*, 17 F. 2d 937 (D. C. M. D. Pa.); *United States* v. *Fitzmaurice*, 45 F. 2d 133 (C. A. 2); *Hefferman* v. *United States*, 50 F. 2d 554 (C. A. 3).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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